(1994) 05 KL CK 0020

High Court Of Kerala

Case No: O.P. No''s. 4450, 6838, 6997, 8481 etc. of 1992, 341, 410, 411 etc. of 1993 and 2404, 3854 and 4269 of 1994

Sivanandan and Others		APPELLANT
	Vs	
State of Kerala and Others		RESPONDENT

Date of Decision: May 24, 1994

Acts Referred:

- Central Sales Tax Act, 1956 - Section 15
- Constitution of India, 1950 - Article 19(1), 226, 286, 366
- Income Tax Act, 1961 - Section 194C
- Kerala General Sales Tax Act, 1963 - Section 2, 22, 23, 25, 5(1)
- Kerala General Sales Tax Rules, 1963 - Rule 22A, 22A(3), 30A, 6(4), 8(4)

Hon'ble Judges: T.L. Viswanatha Iyer, J

Bench: Single Bench

Advocate: V.P. Mohan Kumar, S.A. Nagendran, C.K. Vijayan and S.K. Devi, for the Appellant; T. Karunakaran Nambiar, Special Government Pleader for taxes, for the Respondent

Judgement

T.L. Viswanatha Iyer, J.

The challenge in this batch of writ petitions is to the provisions relating to levy of tax on works contract in the Kerala General Sales Tax Act, 1963 (the Act) and the Kerala General Sales Tax Rules, 1963 (the Rules), as they stand after the amendment, by Acts 23 of 1991 and 8 of 1992 and otherwise. I make it clear that the consideration in these writ petitions is only of the provisions as amended, the provisions before the amendments being the subject of other writ petitions which are pending consideration by a Full Bench of this Court. See ILR 1994 Ker 545.

2. The challenge is sweeping and embraces all the relevant provisions, namely Section 5(1)(iv), Sub-sections (7), (7A), (7B), (8), (10), (11) and (12) of Section 7 and the Fourth Schedule of the Act, as amended by Acts 23 of 1991 and 8 of 1992, and Rules 8 (4), 22A and 30A of the Rules. The challenge is mainly on the ground that the provisions are not in accord with Article 366(29A)(b) of the Constitution introduced by the Constitution (Forty-sixth Amendment) Act, 1982 (hereinafter referred to as the 46th Amendment), as explained by the decisions of the Supreme Court in Builders Association of India v. Union of India (1989) 73 S.T.C. 370, Gannon Dunkerley and Co. v. State of Rajasthan (1993) 88 S.T.C. 204 and Builders Association of India v. State of Karnataka (1993) 88 S.T.C. 248.

2(a) Works contracts as such were not liable for tax in the State till 1st April 1984, when consequent to the introduction of Clause 29 A in Article 366 of the Constitution, defining the expression "tax on the sale or purchase of goods", amendments were made to the Act and the Rules to levy tax on the transactions of sale, as enabled by the said Constitution amendment. The definitions of "dealer", "goods" and "sale" were inter alia amended to bring to tax the transactions which could be brought to tax by virtue of the 46th Amendment. Explanation 3A to Section 2(xxi) containing the definition of "sale" was thus introduced to provide that a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to be a sale. Appropriate amendments were also made to the definition of "turnover" besides introducing a definition of "works contract" in Section 2(xxix)(a). Section 5 which is the charging section was amended to provide a charge on the transfer of goods involved in the execution of a works contract and provision was made in Rule 8 by introducing Sub-clause (4) prescribing the manner in which the total turnover of a dealer in relation to works contract was to be determined. Sub-rule (4) as it stood at the time of its introduction in 1984 merely provided that the total turnover in relation to works contract shall be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue from the time to time for different areas and for different types of, contracts towards cost of labour. I am not entering into the details of the percentage so fixed as it is unnecessary for the purposes of these cases.

3. These amendments to the Act and the Rules as also some subsequent amendments made in the year 1987 are the subject matter of challenge in a series of writ petitions which have been referred to a Full Bench for consideration. These cases are pending.

4. The Act and the Rules underwent further changes by the amendment Acts 23 of 1991 and 8 of 1992, and the consequent changes in the Rules. I may at once mention that Section 5(1)(iv) was substituted by a new one with effect from 1st April 1991; Sub-section (7) to (11) of Section 7 which were introduced by the 1991

amendment were retrospectively brought into force from 1st April 1984, while Sub-section (12) added in 1992 came into force on 1st April 1992. Before entering into the discussion of the case, it will be advantageous to extract these provisions which are under challenge:

5. Levy of tax on sale or purchase of goods.-(1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than one lakh rupees and every casual trader-or agent of a non-resident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year,-

(iv)(a) In the case of transfer of goods involved in the execution of works contract where transfer is in the form of goods at the rates and at the points specified against such goods in the First, Second or Fifth Schedules.

(b) In the case of transfer of goods involved in the execution of works contract (where the transfer is not in the form of goods but in some other form) specified in the Fourth Schedule at the rate specified against such contract in the said Schedule:

Provided that no tax is payable in respect of the turnover of goods the transfer of which was effected without any processing or manufacture on which tax was levied under Clause (i) on any earlier sale in the State or which are exempted from tax and for goods coming under the Fifth Schedule, no tax specified for the first sale is payable on which tax was levied in any earlier sale in the State:

Provided further that tax payable in respect of turnover of goods coming under the Second Schedule the transfer of which was effected without any processing or manufacture shall not exceed the rate and be only at the points specified against such goods in the said Schedule.

7. Payment of tax at compounded rates-

(7) Notwithstanding anything contained in Sub-section (1) of Section 5 every contractor, in civil works of construction of buildings, bridges, roads, dams and canals including any repair or maintenance of such civil works may at his option instead of. paying tax in accordance with clause (of that sub-section pay tax at the rate of two per cent on the whole amount of contract and which shall be deducted from the payments made by the awarder at every tune including advance payment and shall remit it to Government in such manner as may be prescribed.

(7A) Notwithstanding anything contained in Sub-section (1) of Section 5 every contractor not covered by Sub-section (7) may at his option, insted of paying tax in accordance with the said section, pay tax on the whole amount of contract at the rate of sevenly per cent of the rates shown in the Fourth Schedule against such contract, tax paid by him under this Act on the purchase of any goods such contract, the transfer of which to the works contract was without any processing or manufacture;

Provided that any contractor whose total annual contract amount does not exceed rupees fifty lakhs and has not opted for payment of tax in accordance with this Sub-section may opt to pay tax at five per cent on the whole contract amount irrespective of the nature of the contract:

(7B) The tax under Clause (iv) of Sub-section (1) of Section 5, Sub-sections (7) and (7A) of this section shall be deducted from the payment made by the awarder at every time including advance payment and remit it to Government within seven days in the prescribed manner.

(8) The option referred to in Sub-sections (7) and (7A) may be exercised either by an express provision in the agreement for the contract or by an application to the assessing authority to permit him to pay tax in accordance with any of these Sub-sections.

(10) If the awarder affects any payment without deduction of the tax payable or without the permission of the assessing authority in case application is presented before him, the whole amount of tax payable shall be recovered from the award and all provisions of this Act or the recovery of tax including those relating to levy of penal interest and penalty shall apply as if the awarder is the Assessee for the purposes of this Act.

(11) Any contractor who opts for the payment of tax in accordance with the provisions of Sub-section (7) and (7A) shall file the returns showing all the contracts he has undertaken along with certificates from the awarders, showing the whole amount of contract and the details of tax deducted and remitted to Government and if the particulars are correct and complete, the assessing authority may summarily make an assessment on that basis.

(12) After the close of the year or at the completion of the works contract and on receipt of final statement of accounts and return, if the tax on purchases is found to be in excess of the tax payable under the compounded rates, no refund of such excess tax paid shall be made.

8. Determination of total turnover-

(4) For the purpose of Sub-rule (1), the amount for which goods are sold by a dealer shall, (a) in relation to a works contract in which the transfer of property takes place in the form of goods, the whole amount payable to the dealer for carrying out such contract;

(b) in relation to a works contract in which the transfer of property takes place not as goods but in some other form in which the dealer transfers all the goods involved in the execution of such contract, the whole amount payable to the dealer for carrying out such contract less the labour charges not incurred in relation to the goods involved in the execution of the works contract, as established and proved by the contractor;

(c) in relation to a works contract in which the transfer of property takes place not as goods but in some other form in which the goods supplied by the awarder are partly involved, the proportionate amount of the whole contract amount less labour charges as explained in (b) above worked out in the proportion of the cost of goods supplied by such awarder and the cost of goods supplied by the contractor or other person, be deemed to be turnover of such contractor:

22A. Payment and recovery of tax in works contract.-(1) In the case of works contract on which tax is payable in accordance with the provisions of the Act whether an option under Sub-section (8) of Section 7 is made or not, the tax shall be paid either by the contractor in accordance With the rules or by the awarder.

(2) Wherever payment is made by the awarder to the contractor either in lump sum for the whole contract or in instalments, the awarder shall withhold an amount equal to the tax due in accordance with the provisions of the Act from such payment or payments and shall remit it to the assessing authority with whom the contract is registered as a dealer and if he is not so registered, to the assessing authority having jurisdiction over the place of works contract, within seven days of the amount so withheld along with a statement in Form No. 21C.

(3) Notwithstanding anything contained in Sub-rule (2) above, any contractor who pays tax regularly in accordance with the rules, on production of a certificate issued to that behalf issued by the assessing authority shall be entitled to payment of the contract amount without deduction of sales fax due on the contract for the period and to the extent or for the works contract specified in the certificate.

(Sub-rules (4) and (5) omitted as they are unnecessary.) I am not extracting Rule 30 A as it is only a machinery provision for implementing Sub-section (7) of Section 7 and stands or falls with it).

5. These provisions are challenged as being in conflict with the 46th Amendment. The history behind the said amendment has been set out in detail by the Supreme Court in Builders Association of India v. Union of India (1989) 73 S.T.C. 370 and therefore it is unnecessary to repeat it here. It will be necessary to refer to this decision as also to the two subsequent decisions already referred to in the course of discussion, so that I may just briefly mention the ratio decidendi of each of these cases.

6. In the first of these cases, the constitutional validity of the 46th Amendment itself was challenged, and was overruled. The other challenge which was on the merits was that it was not open to the States to overlook the provisions contained in Article 286 of the Constitution and the Central Sales Tax Act, 1956 (C.S.T. Act, 1956 for short), while legislating for levy of tax on the transactions described in Clause (29A) of Article 366 of the Constitution. The law was declared in the following terms, in so fir as it pertains to works contracts, covered by Sub-clause (b) thereof:

(a) After the 46th Amendment, works contract, which was an indivisible one is by a legal fiction altered into a contract which is divisible, into one for sale of goods and the other for supply of labour and services. It has therefore become possible to the States to levy sales tax on the value of goods involved in a works contract in the same way in which sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate units.

(b) The emphasis under Sub-clause (b) is on the transfer of property in goods, whether as goods or in some other form.

(c) A transfer of property in goods under Sub-clause (b) is deemed to be a sale of the goods involved in the execution of the works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made.

(d) The tax leviable by virtue of Sub-clause (b) is subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. Therefore all transfers, supplies and deliveries of goods covered by the clause are subject to the restrictions and conditions mentioned in Clauses 1 and 2, and Sub-clause (a), as also the additional restriction mentioned in Sub-clause (A), of Clause 3 of Article 286 of the Constitution. Thus if any declared goods are involved in the transfer, supply or delivery, the sale tax will have to comply with the restrictions imposed by Section 15 of the C.S.T. Act, 1956.

(e) The levy of tax on works contract falls when the goods or materials are used in the construction of the building, that is, when they are incorporated in the building and it is not necessary to wait till the final bill is prepared for the entire work.

7. The Supreme Court did not go into the details of the legislations made by the various States and left it to the parties to move the High Courts concerned for necessary relief. Only the broad general principles were laid down in the decision. The parties accordingly approached the various courts besides filing writ petition in the Supreme Court itself, and this led to the latter two decisions of the court elucidating the effect of the 46th Amendment, those decisions being Gannon Dunkerley and Co. v. State of Rajasthan 1993 88 S.T.C. 204 and Builders Association of India v. State of Karnataka (1993) 88 S.T.G. 248. In addition to the general questions involved, these cases also involved the validity of the sales- tax enactments in Rajasthan and Karnataka.

8. In Gannon Dunkerleys Case 1993 88 S.T.C. 204 the Supreme Court dealt with vatious aspects regarding the imposition of tax on works contracts and clarified many points regarding the levy and eventually declared Sub-section (3) of Section 5 of the Rajasthan Sales Tax Act and Clause (i) of Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules as unconstitutional and void, the reasons for which I shall mention later. The conclusions in the decision, in so far as they are relevant for the

present discussion, may be summarised briefly in my own words, though a summary thereof appears at page 237 of the report.

(a) The court reiterated what they had stated earlier in the first Builders Association of India''s case (1989) 73 S.T.C. 370 that the power to impose tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, is subject to the prohibitions/ limitations contained in Article 286 of the Constitution, read with Sections 3, 4 and 5 of the C.S.T. Act, 1956. It was therefore impermissible for the State legislature to frame its enactment in such a manner as to transgress these constitutional limitations, and to impose tax on the goods involved in the execution of a works contract, where the transactions take place in the course of inter-state trade or commerce or outside the State or in the course of import or export. Whether such a contingency could arise in the execution of a works contract will have to be decided in the light of the particular terms of the contract, and no abstract proposition can be laid down. The levy of tax will also be subject to the provisions of Sections 14 and 15 of the C.S.T. Act, 1956.

(b) The measure for the levy of the tax is the value of the goods involved in the execution of the contract. Since the taxable event is the transfer of property in the goods involved in the execution of the works contract, and since the transfer of property takes place when the goods are incorporated in the works, the value of the goods on which the tax could be levied is the value at the time of incorporation of the goods in the works, and not the cost of acquisition thereof by the contractor.

(c) The court next addressed itself on the question as to how the value of the goods is to be determined when a consolidated sum is received for. the value of the goods, and for labour and service charges. The court held that the value of the goods for purposes of levy of the tax has to be determined by taking into account the value of the entire works contract, and deducting therefrom the charges towards labour and services which would cover (1) labour charges for execution of the works; (2) amount paid to a sub contractor for labour and services; (3) charges for planning, designing and architect''s fees; (4) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract; (5) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and (6) cost of establishment of the contractor to the extent it is relatable to supply of labour and services; (7) other similar expenses relatable to supply of labour and services; (8) profit earned by the contractor to the extent it is relatable to supply of labour and services. The amounts deductible under these heads will have to be determined in the light of the facts of a particular case, on the basis of the materials produced by the contractor.

(d) Apart from the aforesaid deductions, it is also necessary to exclude from the value of the works contract the value of the goods not taxable in view of Sections 3, 4 and 5 of the C.S.T. Act, 1956 and goods covered by Sections 14 and 15 thereof, as

well as value of goods exempt from tax under the sales tax legislation of the State.

(e) In the case of contractors, who do not maintain proper accounts, or the accounts maintained by them are not found worthy of credence, the States are entitled to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and allow deduction of the amount so determined from the value of the works contract to arrive at the value of the goods involved in the execution of the works contract. This formula need not be uniform for all works contracts and may vary depending on the nature of the contract; but it must be ensured that the amount deductible under the formula does not differ appreciably from the expenses for labour and services, that would be incurred in the normal circumstances in respect of that particular type of works contract.

(f) It is permissible for the State Legislature to tax all the goods involved in the execution of a works contract at a uniform rate which may be different from the rates applicable to individual goods, because the goods which are involved in the execution of the works contract when incorporated in the works can be classified into a separate category for the purpose of imposing the tax and a uniform rate may be prescribed for sale of such goods.

9. On the ground last stated, the Supreme Court upheld the validity of Schedule VI to the Karnataka Sales Tax Act, 1957 (which is akin to the Fourth Schedule of the Kerala Act) in the second Builders Association of India''s case (1993) 88 S.T.C. 248. The court further held in that case, that it was open to the State Legislature, while imposing tax at a uniform rate for the various goods involved in the execution of a works contract, to prescribe different rates for different types of works contracts, depending upon the nature of the works in which the goods are incorporated, i.e. on the basis of the user of the goods. The court also observed that the expression "labour charges" in Sub-clause (iv) of Clause (m) and the expression "labour charges and other like charges" in Sub-clause (iv) of Clause (n) of Sub-rule (4) of Rule 6 of the Karnataka Sales Tax Rules, 1957 were wide enough to include the charges for labour and services as indicated in the decision in Gannon Dunkerly''s Case (1993) 88 S.T.C. 204.

10. It is in the light of these principles laid down by the Supreme Court in the three decisions referred to earlier that the validity of the provisions under challenge has to be decided. I shall now take up the various provisions for consideration.

11. I shall take up the various Sub-sections of Section 7 and the related rules in the first instance. The challenge is to the provisions of Sub-sections (7), (7A), (8), (10), (11) and (12) of Section 7 of the Act and Rules 22A and 30A of the Rules. Of these the main challenge is to Sub-section (7B). So far as Sub-sections (7) and (7A) are concerned, they are complementary to each other and provide for payment of tax at compounded rates-Sub-section (7) in relation to civil construction works contracts of

buildings bridges, roads, dams and canals, while Sub-section (7A) relates to other types of works contracts. Under these provisions, the contractor is afforded an option to pay the tax at the rates mentioned therein, instead of paying tax under Sub-section (1) of Section 5. Sub-sections (8), (10), (11) and (12) and Rule 30A are the machinery provisions for the implementation of these two Sub-sections, the challenge to which is only incidental to the challenge to the main Sub-sections (7) and (7A). Therefore, the challenge to these latter Sub-sections depends upon the sustainability or otherwise of the challenge to Sub-sections (7) and (7A). I shall therefore consider whether Sub-section (7) and (7A) are invalid in any manner.

12. The option to pay tax at the compounded rates is that of the contractors. There is no compulsion on them to opt for payment at those rates. The exercise of the option exonerates the contractors of the necessity of subjecting themselves to the rigorous assessment procedure under the Act except for the very limited purpose contemplated by Sub-section (11) of Section 7. The exercise of the option and the permission to pay tax at the compounded rate generates a contractual relationship between the contractor and the revenue, and if the levy is otherwise within the legislative competence of the State, the option to pay tax at the compounded rate is not liable to be relieved against in a proceeding under Article 226 of the Constitution. I have dealt with the matter at length in my judgment in O.P. No. 15953 of 1993 and related matters, disposed of on April 8, 1994, where the validity of similar provisions for payment of tax at compounded rate at the option of the dealer contained in Sub-section (14) of Section 7 was under challenge. The same reasons will apply to this case also. Since the option is that of the contractor himself to be exercised at his will, and since there is no compulsion on him to opt, which he does with open eyes, I do not find any substance in the challenge to Sub-sections (7) and (7A) and .consequently to Sub-sections (8), (10), (11) and (12) or Rule 30A which provide only for the machinery for the effective implementation of the opinion.

13. There was a related faint challenge to Sub-section (12) which lays down that no refund of any excess shall be made if the tax payable at the compounded rate is found at the end of the year or on completion of the works contract, to be less than the tax on the purchases of goods used in the contract. I do not find anything illegal in this. The Sub-section is apparently related to Sub-section (7A). What the dealer has opted to pay is tax at the compounded rate less any tax paid by him under the Act on the purchase of any goods used the contract. The very purpose of payment of tax at compounded rate is the avoidance of the complicated and prolonged procedure of assessment it is a procedure by which the dealer makes payment of the compounded amount in full quittance of his liability under the Act. It may be more or less than the amount that may actually be payable if an assessment is made. But all this is avoided and collection of tax facilitated by the process of compounding. It is a matter of adjustment of rights and liabilities on both sides question of accounting between the State and the contractor does not therefore arise when tax is paid at the compounded rate. Sub-section (12) is intended to clarify

this purpose and to obviate disputes being raised by the dealer, despite the compounding. Avoidance of wrangles and disputes being of the very essence of Sub-sections (7) and (7A), a further clarificatary provision-Sub-section (12) being one such- incidental and necessary for the proper implementation of the compounding provision is not unconstitutional or void in any manner.

14. There was however a very vehement and serious challenge to Sub-section (7B) and its machinery provision Rule 22A, Which require the awarder to deduct the tax due u/s 5(1)(iv) or the compounded amount of tax due under Sub-sections (7) and (7A) from the payments made to the contractor every time, including advance payments, and remit the same to the Government. This is challenged as beyond the competence of the State Legislature, the plea being that tax is payable under Entry 54 only as and when a sale takes place and not in anticipation of a sale. But it is well established that a legislative entry is to be liberally construed as comprehending within it all the powers which are necessary, incidental or ancillary for the effective implementation of the power conferred by the said entry. In the case of a taxing statute, it is open to the Legislature to enact provisions which would check evasion of tax Sardar Baldev Singh Vs. Commissioner of Income Tax, Delhi and Ajmer, , The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc., The power to tax includes the power to provide the means to make the realisation of the tax effective (Chaturbhai v. Union of India AIR 1960 S.G. 424 429. What Sub-section (7B) seeks to achieve is to facilitate the collection of revenue as also loss to the State by recoveries becoming impossible. Such a provision is incidental and necessary for the effective enforcement of the levy of tax on a deemed sale under Sub-clause (b) of Clause (29A) of Article 366 read with Entry 54 of the State List to the Constitution.

15. Further, there is in reality no collection of tax in advance, except where any amount is paid as advance to the contractor. In effect, the deduction and payment is only of tax as and when the transfer of property in goods takes place and progressive payments are made to the contractor. Since the levy and collection is related to the factual existence of a contract and a deemed sale, even the deduction of the tax out of advance payments cannot be said to violate Entry 54. It must be mentioned here that sales tax need not always be collected at the actual moment of the sale. All that is required is, it should be related to a sale and not to any other event. It cannot be stated; having regard to the existence of the works contract, that no sale takes place. Therefore the collection of the tax by deduction from the payments made to the contractor cannot be cavilled against. It is only a machinery for collection of the tax and hence valid as was held in Geeta Prasad Singh and Co. v. State (1936) 63 S.T.C. 337 (Pat.); Construction and Construction v. Union of India (1990) 70 S.T.C. 405 (Pat.) and Tirath Ram Ahuja Ltd. v. State of Haryana (1991) 83 S.T.C. 523 (Puj. and Hary.). In Geetha Prasad Singh and Co. (1936) 63 S.T.C. 337 (Pat.), the Patna High Court treated the deduction as akin to recovery of advance tax, which was not a new concept, but one well accepted in the law of taxation (see

Section 194C of the Income Tax Act, 1961.) Tirath Ram Ahuja Ltd. (1991) 83 S.T.C. 523 (Puj. and Hary.) also dealt with the matter similarly. I am in agreement with these decisions. Sub-section (7B) is not in my opinion liable to fail for want of legislative competence.

16. Some other facets of the challenge to Sub-section (7B) may now be considered. It is submitted first that the provision is in conflict with Sections 22, 23 and 25 of the Act and has therefore to be read down to accord with the same. I am not going-into the details of these provisions for, even assuming that there is any such conflict-for which I find no warrant-nothing prevents the legislature from making a special provision for works contracts, and when such special provision is made, it must prevail over the general provisions contained in Sections 22, 23 and 25.

17. Another ground of challenge was that the deduction is made in a summary and arbitrary manner without ascertaining the actual liability, and it was stated, without making allowance for sales taking place in the course of interstate trade, for declared goods and for labour charges. I find no substance at all in this charge. The Sub-section comprises of different segments; one dealing with those who have not opted for payment of tax at the compounded rates and therefore making payment of the tax u/s 5(1(iv); and the other dealing with those who have so opted under Sub-sections (7) and (7A). So far as the latter are concerned, none of the questions posed arise since it is only a question of arithmetical calculation with reference to the measure for the levy prescribed therein, and in the case of those falling under Sub-section (7A), also making deduction of the amount of tax paid by the contractor on the purchases effected by him of goods used in the contract. The question therefore arises, in effect, only in regard to those contractors who have not opted for payment under Sub-sections (7) and (7A).

18. Now, what is directed to be deducted and paid is the tax due under Clause (iv) of Sub-section (1) of Section 5. Section 5 charges tax on the taxable turnover of a dealer. In the case of a works contract, where the transfer of property in goods takes place in the form of goods, the tax is payable at the rates and at the points specified in the First, Second and Fifth Schedules; and in case where the transfer takes place in some other form, at the rate specified against such contract in the Fourth Schedule in relation to that contract. The two provisos provide for some exemptions. The charge being on taxable turnover, we have naturally to turn to the definition of that term in Section 2(xxv) to see what is the measure for the levy. It will be seen therefrom that in determining the taxable turnover; deduction has to be made of the turnover of purchases and sales in the course of interstate trade and in the course of export or import besides other items which are prescribed by the rules, which so far as is relevant, are Rules 8(4) and 9. Sub-section (7B) has to be read with these provisions, Section 5(1)(iv) and Section 2(xxv), and so read, it cannot be branded as arbitrary or bereft of provisions for making admissible deductions. The Sub-section is not therefore liable to challenge as such on this ground. If there

is any defect, or if all the permissible deductions are not provided for in arriving at the taxable turnover for purposes of Section 5(1)(iv)(b), that will be a matter concerning the vires of that provision, and not a ground for striking down Sub-section (7B).

19. A plea of violation of the fundamental right to carry on his profession by a contractor, guaranteed by Article 19(1)(g) was raised. But in the absence of any details I am unable to uphold the plea. Even otherwise, the deduction is substantially only of tax that becomes payable as and when the work goes on and the goods are imbedded in the contract. It is only in the few cases of advance payments made to the contractor before commencement of the work, that this question, can, if at all, arise. But then I am unable to understand how payment of this tax destroys the business, especially because the work is agreed upon and its commencement is in the offing. I reject this plea.

20. I may incidentally note that any deduction and payment made, of tax due from a contractor, who has not opted for payment at the compounded rate is subject to adjustment at the final assessment that has to be made on him. In any case, Rule 22A(3) affords the contractor an option and an opportunity to avoid the alleged offensive deduction by paying the tax regularly in accordance with the rules. I do not find anything in Sub-section (7B) justifying the various apprehensions voiced by the Petitioners.

21. For all these reasons I am unable to uphold the challenge to Sub-section (7B). For the very same reasons, I am also unable to agree with the decisions of the High Court of Orissa in Brajendra Mishra v. State of Orissa (1994) 92 S.T.C. 17 and of the Full Bench of the Patna High Court in Builders Association of India v. State of Bihar (1992) 85 S.T.C. 362 invalidating the deduction. I do not find anything in the observations in the decision of the Supreme Court in the first Builders Association of India case (1989) 7 S.T.C. 370 extracted at page 379 of the decision of the Patna High Court which compels a decision that the provision is unconstitutional. I express my dissent from the aforesaid two decisions.

22. Before leaving these sections, I may mention a point raised by one of the Petitioners, that Sub-section (7A) postulates deduction only of tax paid on the purchase by the contractor himself, but not of tax paid by an anterior purchaser. The question is hypothetical, not related to any specific case on hand. In any case, even if it be as stated, that has no impact on the constitutional validity of the provision.

23. Rules 22A and 30A are provisions intended to implement the various Sub-sections of Sections 7, relating to works contract. Since I have upheld the validity of these Sub-sections, neither of these rules can be considered invalid. In fact Sub-rule (3) of Rule 22A mentioned earlier, contains a very beneficent provision in favour of the contractor. It is upto him to avail of this provision, if so desired and

avoid being subjected to the provision for deduction in Sub-section (7B).

24. I therefore hold that Sub-section (7B) does not also suffer from the vice of unconstitutionality pleaded by the Petitioners.

25. The challenge to the Fourth Schedule as being contrary to the rationale and purpose of Sub-clause (b) of Clause (29A) of Article 366 of the Constitution, as also of being discriminatory, has only to be repelled in the light of the decision of the Supreme Court in the second Builders Association of India case (1993) 88 S.T.C. 248 where the court upheld the validity of the similar Sixth Schedule in the Karnataka Sales Tax Act. In view of this decision, it is unnecessary for me to expatiate further on this point.

26. I now come to the main charging provision, namely Clause (iv) of Sub-section (1) of Section 5, particularly Sub-clause (b). So far as Sub-clause (a) is concerned, I do not find any substance in the challenge made, nor do I find it to be redundant as contended. It deals with one class of cases covered by Sub-clause (b) of Clause (29A) of Article 366, namely cases where the transfer of property in the goods takes place in the form of goods, for which it is provided that the tax shall be payable at the rates, and at the-points, specified against such goods in the First, Second or Fifth Schedule. The provision is strictly in accord with the principles laid down in the first Builders Association of India case (1989) 75 S.T.C. 370 where the Supreme Court, after tracing the history of" the 46th Amendment, and the State legislations, pointed out that what the 46th Amendment did was only to make divisible into various components, what otherwise was an indivisible contract for the execution of a work. The effect of the amendment was thus to fictionally create sales of the goods involved in the execution of the works contract, though they have become part of the conglomerate which eventually passed on to the awarder of the contract. It is therefore that the sales of the goods concerned were held subject to the same restrictions/limitations to which those sales would have been subject had the sales taken place as goods themselves. Sub-clause (a) of Section 5(1)(iv) recalls this principle where the transfer is in the form of goods, and the tax is made payable only as per the provisions of the First, Second and Fifth Schedules. The exemptions and exclusions avilable as on a normal sale of these goods are also attracted as the tax is only on the taxable turnover as defined in Section 2(xxv). There cannot therefore be any grievance either about the rate of tax or the base of the levy and therefore Sub-clause (a) is beyond challenge and has only to be upheld.

27. The challenge is mainly levelled against Sub-clause (b) which deals with the transfer of goods involved in the execution of a works contract, when the transfer is not in the form of goods, but in some other form. In such cases the tax is levied on the taxable turnover at the rate specified against the contract in question in the Fourth Schedule to the Act. These sales are also subject to the same limitations and restrictions as an ordinary sale of the goods involved in the execution of the work, but subject to the exception that a uniform rate of tax may be adopted for all the

goods involved, different from that imposable if the sales take place as goods in the ordinary course. This latter course has been adopted in Sub-clause (b), so that, so far as the rate of taxis concerned, there could be no challenge, having regard to the decision of the Supreme Court in the second Builders Association of India case (1993) 88 S.T.C. 248. The crux of the dispute is in relation to the turnover taxable, or the measure for the levy, as termed by the Supreme Court.

28. What is permitted to be taxed by the 46th Amendment is only the value of the goods which are transferred in the execution of the works contract. Where a composite all inclusive amount is fixed for the work-for the value of the goods and the labour and service charges-and the transfer of the goods takes place not in the form of goods, but in some other from, difficulties arise'' regarding the determination of the value of the goods on which the tax is permitted to be levied. The Supreme Court addressed their attention to the question and laid down the principles that should govern the determination of the value of the goods as also the taxable turnover in such cases, in the decision in Gannon Dunkerley and Co. (1993) 88 S.T.C. 204. Two steps are actually involved in the process of arriving at the taxable turnover, the first of which relates to the determination of the actual value of the goods involved. Since the composite amount paid for the execution of the work includes many items, besides the value of the goods, like labour charges, hire charges for machinery, cost of consumables, establishment charges of the contractor, his profit, etc. collectively termed as charges for labour and services by the Supreme Court, the value of the goods involved in the work will be the value of the contract reduced by the aggregate of the labour and service charges comprised of the various components. The Supreme Court enumerated eight items as generally falling under the generic term labour and service charges and held that they should be deducted from the value of the works contract to arrive at the value of the goods involved in the work. This is the first step. The next step relates to the fixation of the taxable turnover and how the tax is to be levied. This stems from the fact that the sale of the goods involved in a works contract is deemed to have taken place as goods despite the property therein passing, not as goods, but as a conglomerate, thereby subjecting the sale to the same disciplines, restrictions, conditions and limitations, as in an ordinary sale of those goods qua goods. Thus sales or purcharses of the goods involved in the execution of the work, in the course of the interstate trade or commerce, outside the State and in the course of import and export are liable to be excluded from the levy. Equally the exemptions and exclusions available under the local sales tax enactment, be it total or partial, or re rate or point of levy as also the inhibitions contained in Section 15 of the C.S.T. Act apply with full force to such deemed sales. The taxable turnover has to be ascertained with reference to all this. This is the second step in the levy of the tax.

29. The gravamen of the Petitioners'' charge is that Sub-clause (b) of Section 5(1)(iv) or Rules 8(4) and 9 do not conform to the above elucidation of the requirements of the 46th Amendment by the Supreme Court and therefore they are unconstitutional

and void. They seek to draw support from the decision in Gannon Dunkerely (1993) 88 S.T.C. 204 where the Supreme Court struck down Section 5(3) of the Rajasthan Sales Tax Act, and Rule 29(2)(i) framed thereunder.

30. I may at once mention that the Rajasthan analogy will not apply to the Kerala Act. The provisions are basically different. The base of the levy for works contracts under the Rajasthan Act was "turnover" while in relation to all other sales, it was "taxable turnover" arrived at after making the prescribed deductions from the "turnover". In consequence, tax became leviable in respect of goods used in the execution of a works contract, even though the sales or purchases took place in the course of interstate trade or commerce, or out side the State or in the course of import or export. There was no provision oven for deduction of items on which no tax was payable under the charging section of the Act; nor did it take into account the conditions and restrictions imposed by Section 15 of the C.S.T. Act, 1956. It was in these circumstances that the Supreme Court felt constrained to hold that Section 5(3) transgressed the limits of the legislative power conferred on the State Legislature under enrty 54 of the State List. Clause (i) of Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules was also held to suffer from the same infirmity and both the provisions were accordingly declared unconstitutional and void.

31. The position under the Kerala Act is different. The charge u/s 5 of the Kerala Act, whether it be in relation to works contract or otherwise, is on the "taxable turnover", as defined in Section 2(xxv) so that the levy of tax on the goods involved in the execution of a works contract is only on the turnover arrived at after making all the deductions, exclusions and exemptions available regarding sales of goods taking place in the ordinary course. These include exclusion of sales or purchases in the course of interstate trade or commerce, or in the course of import or export, as also of sales and purchases wholly or partially exempted under the provisions of the Act. Conformity with Section 15 of the C.S.T. Act, 1956 is also ensured. The provisions of the Kerala Act do not therefore suffer from the vice which vitiated the provisions of the Rajasthan Act and the Rules. The deemed sales of goods involved in a works contract are treated in the same manner as any other sale of those goods under the Act (except the uniform rate), so that Section 5(1)(iv)(b) is not open to challenge on the grounds on which the Rajasthan provisions were struck down.

32. The attack based on the Rajasthan Act really pertains to the realm of the second step in the determination of the taxable turnover. The two provisos to Sub-clause (b) to Section 5(1)(iv) also relate to this subsequent process after the value of the goods involved is determined by deducting the labour and service charges from the value of the contract. Counsel for the Petitioners however contend that the language of these provisos leaves no room for doubt that the only deductions permissible to arrive at the taxable turnover are those pertaining to the goods mentioned in the first proviso, and that only the tax payable on these goods is made, by the second proviso, subject to the restrictions imposed by the C.S.T. Act, 1956, on declared

goods. What is submitted is that by virtue of these provisos, the ambit of the term taxable turnover in the main part of Section 5(1) has been whittled down regarding works contracts, and restricted to the turnover relating to those goods, the transfer of which is effected without processing or manufacture. This qualification, it is pointed out, cuts at the very basis of Article 366(29A)(b) as expounded by the Supreme Court. I shall deal with this complaint.

33. If Sub-clause (b) had stood, without the provisos, there could be no complaint whatsoever as the tax is payable on the taxable turnover of all the goods involved as on a normal sale of those goods as goods, though at the uniform rate specified in the Fourth Schedule. Actually the determination of the taxable turnover involves the deductions/concessions mentioned in the two provisos, by virtue of Clauses (d), (e), (h) and (j) of Rule 9 of the Rules. The two provisos have apparently been enacted to limit these benefits to the turnover of those goods, the transfer of which is effected without any processing or manufacture and to deny the benefits to those goods which have been subjected to some processing or manufacture before being embedded in the work. But in doing so, the legislature has outstepped the field carved out by Article 366(29A)(b) for levy of tax by excluding such goods which have undergone processing or manufacture, from the benefits which would otherwise have accrued to them on a normal sale as goods.

34. What the 46th Amendment has done is do disintegrate an indivisible contract into a divisible one, of sale of the various components involved in the execution of the work. That means there is a deemed sale of every item of goods involved in the work. The conversion of the goods by processing or manufacture, during the course of the work, or for purpose of the work is immaterial and irrelevant, as what the amendment permits is a levy of tax on the basic goods, and not on the intermediate products. In fact, the contract is an indivisible one by which the awarder bargains for the execution or erection of a work, as such, and what is permitted to be taxed is the turnover of goods involved in the execution of that work. The conversion of the goods, into intermediate products, before being imbedded, will not detract from the fact that so far as the contractor is concerned, the transfer is of the basic components or goods involved in the execution of the work. It is on these that Article 366(29A)(b) permits levy of tax, which must therefore follow the disciplines prescribed in the Act, the C.S.T. Act, 1946 and in the Constitution regarding sale or purchase of those goods. The contract3r cannot be denied the benefits of exemption, total or partial, or lower rate of tax, because he embedded the materials in the work after converting them into some other intermediate category of goods. That is what the offending words in the two provisos seek to do. They are therefore bad.

35. The position as it stands under the provisos is like this. Iron and steel which have been used by the contractor in the making of a window grill, or a trellis work, or a truss, or cement, and iron and steel used for making a pile which is driven into the

foundation; or timber made into doors and windows, which are subsequently used in the work, will be liable to be taxed (though otherwise non-liable), merely because they have undergone a process of processing or manufacture before being used in the work. This, in my opinion, is not correct. The transformation which these good undergo at the hands of the contractor for the purpose of the execution of the work is liable to be eschewed in considering whether they are liable to tax or not. They cannot be treated differently, and denied the benefits otherwise available to them, merely because they have been subjected to processing or manufacture in the course of the work. Nor do the intermediate goods become liable to be taxed separately. The limitation contained in the two provisos is therefore unconstitutional and void.

36. This part of the provisos is severable from the rest, and is not so essential for them to exist as to necessitate the striking down of the provisos in entirety because of this vitiating factor. Not that the striking down of the provisos has any impact on Sub-clause (b) of Section 5(1)(iv), as the provision is workable even without them, the levy being on the taxable turnover. But it is only necessary to strike down the offending portion of the provisos, namely "the transfer of which was effected without any processing or manufacture" and to declare it as unconstitutional and void. I do so. This clause will stand eschewed from both the provisos to Sub-clause (b) of Section 5(1)(iv).

37. This will have an impact on Sub-section (7A) of Section 7 also, but since that is a provision for payment of tax at compounded rate on option exercised by the contractor, I am not interfering with the same.

38. I shall now take up the remaining point related to the first step mentioned earlier of arriving at the value of the goods. The complaint is that neither Sub-section (b) nor Rules 8(4)(b) and 9, make provision for deduction of all the items enumerated by the Supreme Court in Gannon Dunkerley (1993) 88 S.T.C. 204 to arrive at the value of the goods involved in the work and therefore these provisions are invalid. Out of ''the eight items so enumerated, Clause (m) of Rule 9 provides for deduction of amounts paid to a sub contractor, in the determination of the value of the goods; besides Rule 8(4)(b) which directs reduction of labour charges not incurred in relation to the goods involved in the execution of the works contract, as established and proved by the contractor. The Ors. are not mentioned, but going by the decision in the second Builders Association of India case (1993) 88 S.T.C. 248 257, the expression "labour charges" is wide enough to include the charges for labour and services as indicated in Gannon Dunkerley (1993) 88 S.T.C. 204. In view of this exposition by the Supreme Court, neither Sub-section (b) of Section 5(1)(iv) nor Rule 8(4)(b) can be held void for non enumeration specifically of the various items deductible from the value of the contract, for arriving at the value of the goods. The generic term "labour charges" embraces all those items, (other than the value of the goods) which go to make up the value of the contract and a provision for deduction

of the "labour charges" is sufficient to do service for deduction of all those items enumerated by the Supreme Court. Rule 8(4)(b) and Rule 9 cannot therefore be invalidated on this ground.

39. But Rule 8(4)(b) is not happily worded and in my opinion, a part of it has to be excised for Anr. reason. The rule limits the labour charges to be deducted to those "not incurred in relation to the goods involved in the execution of the works contract". The labour charges envisaged by the Supreme Court are those incurred in relation to the works contract, i.e. those incurred in the execution of the work, in the user of the goods and in embedding them in the work. Thus the labour charges incurred in the execution or erection of the work, with the goods which are transferred, are the ones liable to be deducted from the value of the contract to determine the value of the goods involved. But Rule 8(4)(b) excludes such charges from deduction. It says, only those charges not incurred in relation to the goods involved in the execution of the works contract, are liable to be deducted. I do not know what could be the labour charges which have no relation to the goods involved in the work; but that is the rule. Thus there is no provision for excluding the labour charges involved in the execution of the work with the goods transferred. This, in my opinion, is contrary to Article 366(29A)(b) as elucidated by the Supreme Court, by levying tax on amount which does not represent value of any goods at all.

40. Rule 8(4)(b) is not therefore in accord with Article 366(29A)(b) and is invalid. But Section 5(1)(iv)(b) suffers from no such vice, as the tax is levied only on the taxable turnover; and it is the prescription of the mode of determining the taxable turnover in Rule 8(4)(b) that is vitiated, in the manner indicated above.

41. I felt a doubt whether the rule had been wrongly printed in the text books, but the Gazette notification reads it the same way. I looked up the Karnataka rule, Rule 6(4)(n)(iv) dealt with by the Supreme Court, and find that it is worded: "labour charges and other like charges involving any transfer of property in goods actually incurred in connection with the execution of the works contract". The Kerala Rule has omitted the words "involving any transfer of property in goods actually", with the result we are left with, what in my opinion, is a provision which does not accord with Article 366(29A)(b).

42. But it is not necessary to'' strike down the entire rule on this ground. The offending part is severable from the rest, which can survive'' even without this part. I therefore declare that the exclusion in Rule 8(4)(b) of labour charges incurred in relation to the goods involved in the execution of the works contract from deduction is unconstitutional and void. The rule will be read eschewing the expression "not incurred in relation to the goods involved in the execution of the works contract" therefrom. It has not been pointed out how any invalidity attaches to any part of Rule 9.

43. My conclusions may be summarised as follows:

(a) Section 5(1)(iv)(a), Sub-sections (7), (7A), (7B), (8), (10), (11) and (12) of Section 7 of the Kerala General Sales Tax Act, 1963 and Rules 9, 22A and 30A of the Kerala General Sales Tax Rules, 1963 are not unconstitutional or void.

(b) The provision in the two provisos to Sub-clause (b) of Section 5(1)(iv) limiting the applicability thereof to cases where the transfer of goods is effected without any processing or manufacture is unconstitutional and void. The expression: "the transfer of which was effected without any processing or manufacture" will be esehewed from the provisos. In all other respects, Sub-clause (b) and the provisos are valid.

(c) The expression "labour charges" in Rule 8(4)(b) is wide enough to include all the eight heads of labour and service charges enumerated by the Supreme Court in Gannon Dunkerley and Co v. State of Rajasthan (1993) 88 S.T.C. 204 and all these items are liable to be deducted from the value of the contract in determining the value of the goods involved in the execution of the works contract. The limitation contained in the expression "not incurred in relation to the goods involved in the execution of the works contract" occurring in this rule is unconstitutional and void and the rule will be read without this expression in it.

44. I am not dealing with the facts of each individual case. I have only laid down the principles governing the assessment of works contracts. The assessing authorities in these cases may complete the assessments in accordance with this judgment, and if any assessments have already been made on any of the Petitioners, which are not in accord with this judgment, modify the same within a reasonable time.

45. The Original Petitions are disposed of as above.

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